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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 14, 1945.

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 11), appears at R. 14–28.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES INVOLVED

The applicable portions of the Social Security and National Labor Relations Acts are set forth in Appendix A, *infra,* pp. 12–16.

STATEMENT

The basic facts are undisputed. On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra,* p. 15), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford Motor Company for union activity, was ordered reinstated with "back pay" (R. 2, 4, 15–16). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 2, 4, 17). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's re-

quest that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 41–42). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 14–28). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 11).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–3). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 47–48). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 53–60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage",

as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 15), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Section 209 (a) of the Social Security Act (*infra*, p. 12) defines "wages" for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 12–14) in turn defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." The Social Security Board, taking the same position as that adopted earlier by the Internal Revenue Bureau (S. S. T. 359, 1939–1 Cum. Bull. 305; Appendix B, *infra*, pp. 17–18) under the taxing provisions of the Social Security Act, held that "back pay" was not "wages," since, during the period covered by the "back pay" order, the discharged employee did not perform any service for the employer. The court below, suggesting (R. 59) that the presence of the word "service" in the definition of employment "may well have been purely fortuitous," held, however, that the rendition of services is not a prerequisite to classifying money payments as "wages" under the Social Security Act. The

court thought a literal construction of the statutory definition inconsistent with the over-all purpose of the old age benefit provisions of the Social Security Act, as well as with the purposes of the National Labor Relations Act. Proceeding on the premise that the "back pay" provision of the National Labor Relations Act undertakes to restore the unlawfully discharged employee to all the rights he would have enjoyed but for his discharge, the court below reasoned that this objective would be defeated *pro tanto* if "back pay" were not treated as "wages," since the discharged individual would then be deprived of certain Social Security benefits he otherwise would have enjoyed. The court therefore, concluded that with the Labor Act and the Social Security Act "the result of an integrated national labor policy," Congress could not have intended that the Social Security Act should deprive the unlawful discharged employee of "rights" protected by the Labor Act.

1. The correctness of the decision below is seriously open to question. Admittedly, if the term "wages" were given its dictionary meaning, it might well include "back pay." However, the Social Security Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard*